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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 751

L. J. SCOTT, *Petitioner,*

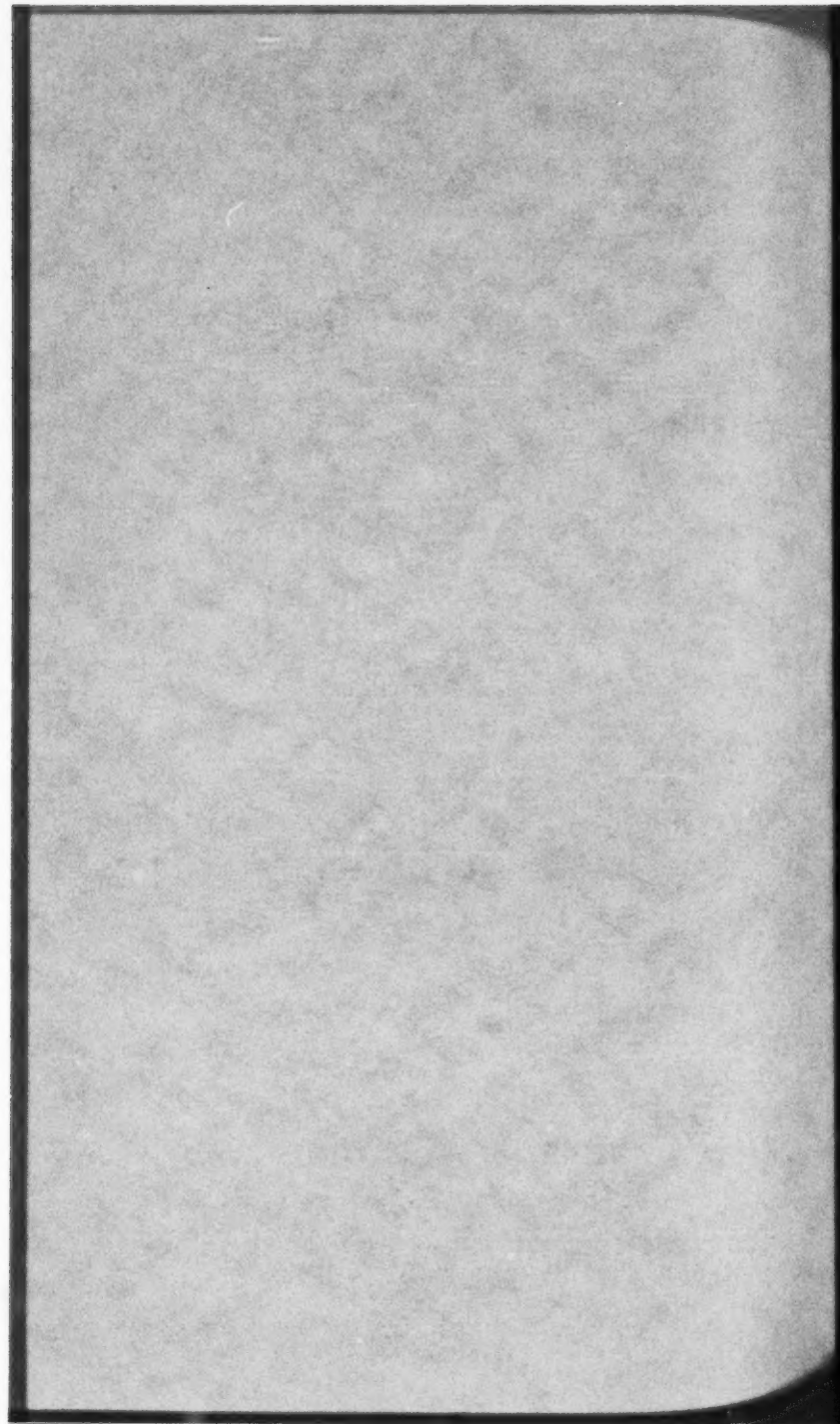
VS.

UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR WRIT OF CERTIORARI
AND BRIEF IN SUPPORT THEREOF**

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INDEX

	Page
Petition for Writ of Certiorari.....	1
Summary Statement of the Matter Involved.....	1
Reasons Relied on for Allowance of This Writ.....	2
Abrams vs. United States, 250 U. S. 116, 63 L. Ed. 1173.....	2
Clyatt vs. United States, 197 U. S. 207, 49 L. Ed. 726.....	2
Colbaugh vs. United States, 8 Cir. 15 Fed. (2d) 929.....	2
Eng Jung vs. United States, 3 Cir. 46 Fed. (2d) 66.....	2
Kassin vs. United States, 5 Cir. 87 Fed. (2d) 18.....	2
Philyaw vs. United States, 8 Cir. 29 Fed. (2d) 225.....	2
Spalitto vs. United States, 8 Cir. 39 Fed. (2d) 782.....	2
United States vs. Russo, 3 Cir. 123 Fed. (2d) 420.....	2
Brief in Support of Petition for Writ of Certiorari.....	4
The Opinion of the Court	4
Jurisdiction	4
Section 240 (a) Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. section 347 (a)); Act of March 8, 1934 (18 U. S. C. A. 688) and Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt in Criminal Cases brought in the District Courts of the United States, promulgated May 7, 1934 (18 U. S. C. A. following section 688)	5
Law Ow Bew vs. U. S., 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340	5
U. S. vs. Gulf Refining Co., 45 S. Ct. 597, 268 U. S. 542, L. Ed. 1082	5
Warner vs. New Orleans, 167 U. S. 467, 17 S. Ct. 892, 42 L. Ed. 239	5
Statement of the Case	6
Specifications of Error	7
Abrams vs. U. S., 250 U. S. 616, 63 L. Ed. 1173.....	7
Clyatt vs. U. S., 197 U. S. 207, 49 L. Ed. 726.....	7
Colbaugh vs. U. S., 8 Cir. 15 Fed. (2d) 929.....	8
Eng Jung vs. U. S., 3 Cir. 46 Fed. (2d) 66.....	8
Kassin vs. U. S., 5 Cir. 87 Fed. (2d) 18.....	8
Philyaw vs. U. S., 8 Cir. 29 Fed. (2d) 225.....	8
Spalitto vs. U. S., 8 Cir. 39 Fed. (2d) 782.....	7
U. S. vs. Russo, 3 Cir. 123 Fed. (2d) 420.....	8

INDEX

	Page
Argument	8
Proposition No. 1	8
<p>The Circuit Court of Appeals erred in not following the rules announced by this Court in <i>Clyatt vs. U. S.</i>, 197 U. S. 207, 49 L. Ed. 726; <i>Abrams vs. U. S.</i>, 250 U. S. 616, 63 L. Ed. 1173, and cases cited therein.</p>	
Abrams vs. United States, <i>supra</i>	10
Clyatt vs. U. S., <i>supra</i>	9
McNabb vs. United States, 318 U. S. 332, 87 L. Ed. 819, 824	11
Proposition No. 2	11
<p>The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals in <i>Spalitto vs. U. S.</i>, 8 Cir. 39 Fed. (2d) 782; <i>Philyaw vs. U. S.</i>, 8 Cir. 29 Fed. (2d) 275; <i>Kassin vs. U. S.</i>, 5 Cir. 87 Fed. (2d) 18; <i>U. S. vs. Russo</i>, 3 Cir. 123 Fed. (2d) 420; <i>Colbaugh vs. U. S.</i>, 8 Cir. 15 Fed. (2d) 929; <i>Eng Jung vs. U. S.</i>, 3 Cir. 46 Fed. (2d) 66, and other Circuit Court cases cited herein.</p>	
Colbaugh vs. U. S., 8 Cir. 15 Fed. (2d) 929	12
Cox vs. United States, 8 Cir. 96 Fed. (2d) 41	12
Eng Jung vs. U. S., 3 Cir. 46 Fed. (2d) 66	12
Kassin vs. United States, 5 Cir. 87 Fed. (2d) 183	12
McLaughlin vs. United States, 3 Cir. 26 Fed. (2d) 1	12
Murphy vs. U. S., 8 Cir. 18 Fed. (2d) 509	12
Paddock vs. United States, 9 Cir. 79 Fed. (2d) 872	12
Riboste et al vs. United States, 8 Cir. 44 Fed. (2d) 21	12
Spalitto vs. United States, 8 Cir. 39 Fed. (2d) 782	12
Stutz vs. United States, 5 Cir. 47 Fed. (2d) 1029	12
Turnetti vs. United States, 8 Cir. 2 Fed. (2d) 15	12
United States vs. Morley, 7 Cir. 99 Fed. (2d) 683	12
Proposition No. 3	14
<p>The decision of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in Criminal cases in Federal Courts and deprives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.</p>	
Emma S. Fayerweather and Mary W. Achter vs. Thomas G. Ritch, et al, 195 U. S. 275, 49 L. Ed. 193	16
Summary of Argument	17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. _____

L. J. SCOTT, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of L. J. Scott respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, Robert Cabe and Sarah Ives were jointly indicted in the United States District Court, Eastern District of Oklahoma, on January 12, 1944, charged in five counts with violations of the Liquor Prohibitory Laws (R. 1-4). Upon trial by jury petitioner was convicted on three counts, acquitted on two counts. Sarah Ives was acquitted

on all five counts. Robert Cabe plead guilty to all five counts.

Motion for new trial was filed by petitioner in the trial court. This being overruled, an appeal was taken to the United States Circuit Court of Appeals, Tenth Circuit, which affirmed the conviction, Circuit Judge Orie L. Phillips dissenting.

B

REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Clyatt vs. United States*, 197 U. S. 207, 49 L. Ed. 726, *Abrams vs. United States*, 250 U. S. 616, 63 Law Ed. 1173, and other cases cited in brief.

2. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals in *Spalitto vs. United States*, 8 Cir. 39 Fed. (2d) 782, *Philyaw vs. United States*, 8 Cir. 29 Fed. (2d) 225, *Kassin vs. United States*, 5 Cir. 87 Fed. (2d) 18, *United States vs. Russo*, 3 Cir. 123 Fed. (2d) 420, *Colbaugh vs. United States*, 8 Cir. 15 Fed. (2d) 929, *Eng Jung vs. United States*, 3 Cir. 46 Fed. (2d) 66, and other Circuit Court cases cited in brief.

3. The decision of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in criminal cases in Federal Courts and de-

prives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, this petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 2919, *L. J. Scott, appellant, vs. United States of America, appellee*, and that the decision and opinion of the Circuit Court of Appeals may be reversed by this Honorable Court, and this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and this petitioner will ever pray.

L. J. SCOTT.

By H. A. LEDBETTER,
Ardmore, Oklahoma,
Counsel for Petitioner.

THOS. W. CHAMPION,
LOUIS A. FISCHL,
Ardmore, Oklahoma,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.-----

L. J. SCOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

THE OPINION OF THE COURT

The opinion in the Circuit Court of Appeals for the Tenth Circuit was rendered October 16, 1944, but has not yet been published. (R. 32.)

II

JURISDICTION

1. Jurisdiction to entertain this petition is vested in this Court under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A.

section 347 (a)); also Act of March 8, 1934 (18 U. S. C. A. 688) and Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt in Criminal Cases brought in the District Courts of the United States, promulgated May 7, 1934 (18 U. S. C. A. following section 688).

2. The opinion of the Circuit Court of Appeals was rendered October 16, 1944 (R. 32), time to file petition for rehearing extended to November 6, 1944 (R. 37) and Petition for Rehearing denied November 14, 1944 (R. 51).

3. Petitioner, Robert Cabe and Sarah Ives were indicted by a Grand Jury in the United States District Court, Eastern District of Oklahoma, charged with violation of United States Statutes (R. 14); petitioner was tried and convicted by a Jury (R. 5) and ordered committed to the custody of the Attorney General (R. 78) which Conviction, Judgment and Commitment was affirmed by the Circuit Court of Appeals, Tenth Circuit (R. 32-37).

4. The following cases sustain the jurisdiction of this Court: *Warner vs. New Orleans*, 167 U. S. 467, 17 S. Ct. 892, 42 L. Ed. 239; *U. S. vs. Gulf Refining Co.*, 45 S. Ct. 597, 268 U. S. 542, 69 L. Ed. 1082; *Law Ow Bew vs. U. S.*, 144 U. S. 47, 12 S. Ct. 517, 36 L. Ed. 340.

III

STATEMENT OF THE CASE

The indictment contained five counts as follows:

Count 1 charged the possession or custody or control of a still and distilling apparatus for the production of spirituous liquors, set up, without having same registered as required by law and in violation of Title 26 U. S. C. A. section 2810;

Count 2: Carrying on the business of a distiller of spirituous liquors without having given bond in violation of Title 26, U. S. C. A. section 2833;

Count 3: Working at a distillery for the production of spirituous liquors, upon which no sign bearing the words, "Registered Distillery" was placed and kept in violation of Title 26 U. S. C. A. section 2831;

Count 4: Making and fermenting mash, wort or wash fit for distillation and for the production of spirits or alcohol, in a building or on premises other than a duly authorized distillery, in violation of Title 26 section 2834;

Count 5: Possession of non-taxpaid whiskey in violation of Title 26 U. S. C. A. section 2803.

Petitioner was convicted on counts 1 (possession or custody or control of still), 2 (carrying on business of distillery without making bond), and 5 (possession of non-taxpaid whiskey). He was acquitted on counts 3 (working at a distillery) and 4 (making or fermenting mash, etc.)

Sarah Ives was acquitted by a jury on all five counts. Robert Cabe entered a plea of guilty to all five counts (R. 5).

At the conclusion of the Government's evidence petitioner demurred thereto on the ground that the same was insufficient to prove the allegations of the indictment or to show the commission of the crime charged (R. 19). At the conclusion of all of the evidence the petitioner moved for an instructed verdict of not guilty (R. 27).

Motion for New Trial was filed and overruled (R. 8).

Petitioner was ordered committed to the custody of the Attorney General for a period of two years on each count 1, 2 and 5, all to run concurrently with each other, and fined \$100.00 on each count 1 and 2, all on execution (R. 8).

Upon appeal to the Circuit Court of Appeals judgment was affirmed (R. 32).

IV

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in not following the rules announced by this Court in *Clyatt vs. U. S.*, 197 U. S. 207, 49 L. Ed. 726; *Abrams vs. U. S.*, 250 U. S. 616, 63 L. Ed. 1173, and cases cited therein.

2. The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals in *Spalitto vs. U. S.*, 8 Cir. 39 Fed. (2d) 782; *Philyaue vs. U.*

S., 8 Cir. 29 Fed. (2d) 225; *Kassin vs. U. S.*, 5 Cir. 87 Fed. (2d) 18; *U. S. vs. Russo*, 3 Cir. 123 Fed. (2d) 420; *Colbaugh vs. U. S.*, 8 Cir. 15 Fed. (2d) 929; *Eng Jung vs. U. S.*, 3 Cir. 46 Fed. (2d) 66, and other Circuit Court cases cited herein.

3. Decisions of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in criminal cases in Federal Courts and deprives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.

V

ARGUMENT

PROPOSITION NO. 1

The Circuit Court of Appeals erred in not following the rules announced by this Court in *Clyatt vs. U. S.*, 197 U. S. 207, 49 L. Ed. 726; *Abrams vs. U. S.*, 250 U. S. 616, 63 L. Ed. 1173, and cases cited therein.

1. The Government's case was based upon circumstantial evidence and substantially established that in March, 1943, petitioner rented the place where the still and whiskey were found on October 8, 1943 (R. 14). At that time the place was in possession of the defendants Sarah Ives and Robert Cabe (R. 18). The petitioner did not live there and was not in possession of the place. Scott was engaged in the hauling and trucking business and was at the place only three or four times from the first of August until the still

was discovered on October 8th (R. 18). A car belonging to petitioner was found at the place at the time of the raid. In the car were four ten-pound sacks of sugar, some trousers and shoes. The clothes and shoes were afterwards identified as belonging to petitioner (R. 15-16).

Petitioner earnestly contends that the only substantial evidence from which his guilt might have been inferred was evidence that he rented the place in March upon which the still and whiskey were found in October and that his car was found at the place at the time of the raid. The whiskey was shown to have been made out of syrup and not sugar (R. 14) and considerable syrup was found on the place. This evidence on the part of the Government tended to establish that the sugar in petitioner's car was not to be used in the making of whiskey, or at least there on the place, because this whiskey, as stated, was made of syrup. The petitioner contends that the evidence was wholly insufficient to warrant a verdict of guilty and that the Circuit Court of Appeals did not follow cases from this Court having application to like procedure in affirming.

In *Clyatt vs. U. S. supra*, this Court said:

"No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

In the Abrams case the following rule is announced in the second headnote:

“The contention that there is no substantial evidence in the record to support a judgment on a verdict of guilty, and that the motion of defendants for an instructed verdict in their favor was erroneously denied, presents a question of law which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence competent and substantial before the jury, fairly tending to sustain the verdict.”

It is the petitioner's contention that the Circuit Court of Appeals did not view this case in the light of these holdings and that the record was not examined for the purpose of determining whether or not at the close of the Government's case and again at the close of the whole case there was competent and substantial evidence, fairly tending to sustain the verdict. Circuit Judge Phillips did this in his dissenting opinion, but the majority of the Court did not do so. It is true that in the concluding sentence of the majority opinion it is stated that the evidence is found to be legally sufficient but the standard set by the majority in its opinion upon which this holding is based is not in accord with the decisions of this Court. The petitioner earnestly contends that if the Circuit Court had applied the principles of the *Clyatt* and *Abrams* cases to the case at bar it would have reached a different conclusion and would have been compelled to hold that the evidence was not sufficient to justify the conviction.

Petitioner believes that the following quotation from *McNabb vs. United States*, 318 U. S. 332, 87 L. Ed. 819, 824, is apropos here:

"The scope of our reviewing power over convictions brought here from Federal Courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law' and below which we reach what is really trial by force."

PROPOSITION NO. 2

The decision of the Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeals in *Spalitto vs. U. S.*, 8 Cir., 39 Fed. (2d) 782; *Philyaw vs. U. S.*, 8 Cir., 29 Fed. (2d) 225; *Kassin vs. U. S.*, 5 Cir., 87 Fed. (2d) 18; *U. S. vs. Russo*, 3 Cir., 123 Fed. (2d) 420; *Colbaugh vs. U. S.*, 8 Cir., 15 Fed. (2d) 929; *Eng Jung vs. U. S.*, 3 Cir., 46 Fed. (2d) 66, and other Circuit Court cases cited herein.

1. In its Opinion the Circuit Court of Appeals said:

"There is no direct evidence to connect the appellant with the still, its operation, or the possession of the non-taxpaid liquor found in the house. No one testified of having seen him at the still, or that he was in any way connected with it. The verdict of the jury rests upon inferences drawn from the admitted facts that he had leased the premises from the owner; that his fiancee, whom he later married, was living in the house when the still was found; that his car was there with his clothes and four 10-

pound sacks of cane sugar, which was susceptible to use in the manufacture of alcoholic spirits, and that he was 'in and out' of the place while the still was in operation. The jury was asked to believe that although he rented the place, and his fiance lived in it with her two small children, she lived there with Cabe while Cabe was operating the still without appellant's knowledge within 225 yards of the house, and that 108 gallons of non-taxpaid whiskey was stored in the loft of the house without his or her knowledge."

To hold that petitioner could be convicted if either he or his co-defendant Sarah Ives knew of the still or whiskey is in conflict with *Colbaugh vs. U. S.*, 8 Cir., 15 Fed. (2d) 929; *Eng Jung vs. U. S.*, 3 Cir., 46 Fed. (2d) 66; *Murphy vs. U. S.*, 8 Cir., 18 Fed. (2d) 509. Petitioner also contends that to hold that he could be convicted if his co-defendant Sarah Ives knew about the still and whiskey even though she afterwards became his wife is in violation of the rights guaranteed to him under the Fifth Amendment to the Constitution and in contravention of the established principles of justice in Federal Courts.

2. In *Cox vs. United States*, 8 Cir. 96 Fed. (2d) 41; *Riboste et al vs. United States*, 8 Cir., 44 Fed. (2d) 21; *Stutz vs. United States*, 5 Cir., 47 Fed. (2d) 1029; *Paddock vs. United States*, 9 Cir., 79 Fed. (2d) 872; *McLaughlin vs. United States*, 3 Cir., 26 Fed. (2d) 1; *Turnetti vs. United States*, 8. Cir., 2 Fed. (2d) 15; *United States vs. Morley*, 7 Cir., 99 Fed. (2d) 683; *Spalitto vs. United States*, 8 Cir., 39 Fed. (2d) 782; *Kassin vs. United States*, 5 Cir., 87

Fed. (2d) 183, the following rules applicable to criminal cases are stated: In a criminal prosecution, if defendant's acts and his professions of innocence are reconcilable, defendant should be dismissed; proof of circumstances which, while consistent with guilt, are not inconsistent with innocence, will not support a conviction; circumstantial evidence must be consistent with guilt and inconsistent with innocence and so strong as to remove every other reasonable hypothesis except defendant's guilt; when a circumstance relied on as evidence of guilt is susceptible of inference favorable to innocence, it is robbed of all probative value, though from other evidence guilt may be fairly deducible.

Petitioner earnestly contends the Circuit Court of Appeals failed to apply these principles of law to this case. Witness the statement in the opinion "that his car was there with his clothes and four 10-pound sacks of cane sugar, which was susceptible to use in the manufacture of alcoholic spirits, and that he was 'in and out' of the place while the still was in operation." The statement that the sugar "was susceptible to use in the manufacture of alcoholic spirits" overlooks the government's evidence that the whiskey was made of syrup, a substantial quantity of which was found by the officers. In view of this fact the evidence about the sugar proved nothing and should not have been used against petitioner. The evidence is that petitioner was "in and out" of the place three or four times from August 1 to

October 8. As we point out under another proposition there was no evidence that he was there at any time while the still was in operation. His being "in and out" three or four times in 68 days is no evidence of guilt in this case, especially when viewed in the light of his subsequent marriage to Sarah Ives, who was living on the place, and who, with Cabe were in possession and custody. These circumstances were as consistent with innocence as with guilt.

Petitioner respectfully submits that the opinion in this case is in conflict with the above cases; that if the principles of law enunciated in these cases had been applied to his case a different result would have been reached. Witness the dissenting opinion of Circuit Judge Phillips. The failure of the Circuit Court of Appeals to follow these cases results in a conflict between the decision in this case and the cited cases requiring the intervention of this Court in petitioner's behalf.

PROPOSITION NO. 3

The decision of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in Criminal cases in Federal Courts and deprives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.

1. The Circuit Court of Appeals in its opinion (R. 35) asserts the admitted facts to be, among others, that:

"Petitioner was 'in and out' of the place while the still was in operation."

It is earnestly submitted that there is no evidence in the record to justify this finding. There is no evidence that the petitioner ever knew about the whiskey or the still. There is no evidence as to when it was in operation. There is no evidence that petitioner was at the place at any time while the still was in operation.

Petitioner believes he is justified in the position that the Circuit Court in reaching the conclusion that the evidence was legally sufficient to sustain the conviction considered as against him and in favor of the Government (1) that the evidence was sufficient from which the jury could infer that petitioner knew about the whiskey and still and that if he did have knowledge of it he could be convicted on counts 1, 2 and 5; (2) that the evidence was sufficient from which the jury could infer that Sarah Ives knew about the whiskey and still and that if she did have knowledge of it this petitioner could be convicted on counts 1, 2 and 5; (3) that the jury could infer the sugar in petitioner's car was to be used in making whiskey in the still found by the arresting officers and that such fact was a circumstance showing petitioner's connection with the whiskey and still and (4) that petitioner being "in and out several times while the still was in operation" must have had some connection therewith. In each instance the Circuit Court of Appeals failed to view this case in accordance with recognized standards and usual course of procedure in criminal cases in Federal Courts and wherein it is held petitioner could have been

convicted if Sarah Ives knew of the whiskey and still petitioner is denied his constitutional rights as guaranteed by the Fifth Amendment to the Constitution; also wherein the Circuit Court of Appeals found as an admitted fact that petitioner had been "in and out several times while the still was in operation" when, as petitioner earnestly contends, there is no evidence justifying this finding; no evidence that he was there at any time when the still was in operation. As a matter of fact, no evidence as to when the still was in operation. The case of *Emma S. Fayerweather and Mary W. Achter vs. Thomas G. Ritch et al*, 195 U. S. 275, 49 L. Ed. 193, is applicable. The first headnote follows:

"The application of the due process of law clause of U. S. Const. 5th Amend. is involved so as to sustain a direct appeal to the Federal Supreme Court from a circuit court, where the latter court gave effect, as *res judicata*, to the judgment of a state court which is claimed unlawfully to have deprived the parties of their property under the forms of law, without any judicial finding of the vital fact which alone could justify such deprivation."

It is apparent that evidence showing petitioner to have been on the place when the still was in operation would have had considerable weight. But there is no such evidence in the record and the use of it by the Circuit Court of Appeals violates petitioner's constitutional rights.

SUMMARY OF ARGUMENT

In summation, petitioner respectfully submits to this Honorable Court that the writ prayed for should be granted for the following reasons:

(a) The opinion of the Circuit Court of Appeals is not in keeping with the applicable principles of Federal criminal law as enunciated in the cases cited under proposition 1;

(b) The opinion of the Circuit Court of Appeals is in conflict with the opinions from other Circuit Courts of Appeals cited under proposition 2;

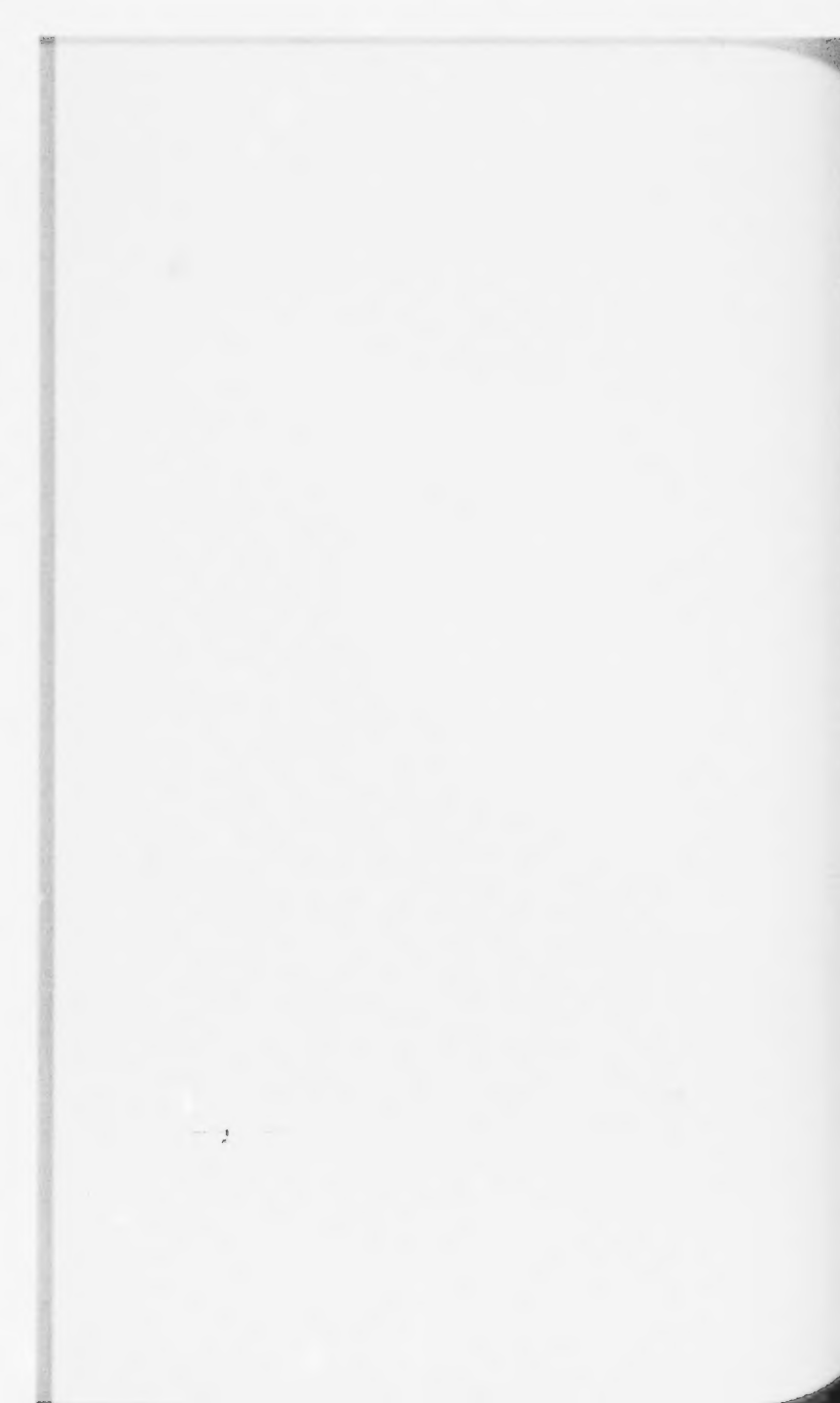
(c) The opinion of the Circuit Court of Appeals is contrary to recognized standards and usual course of judicial procedure in Criminal cases in Federal Courts and deprives this petitioner of his liberty in violation of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

L. J. SCOTT.

By H. A. LEDBETTER,
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THOS. W. CHAMPION,
LOUIS A. FISCHL,
Ardmore, Oklahoma,
Of Counsel.



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U.S. DEPT. OF JUSTICE

No. 151

In the Supreme Court of the United States

Between

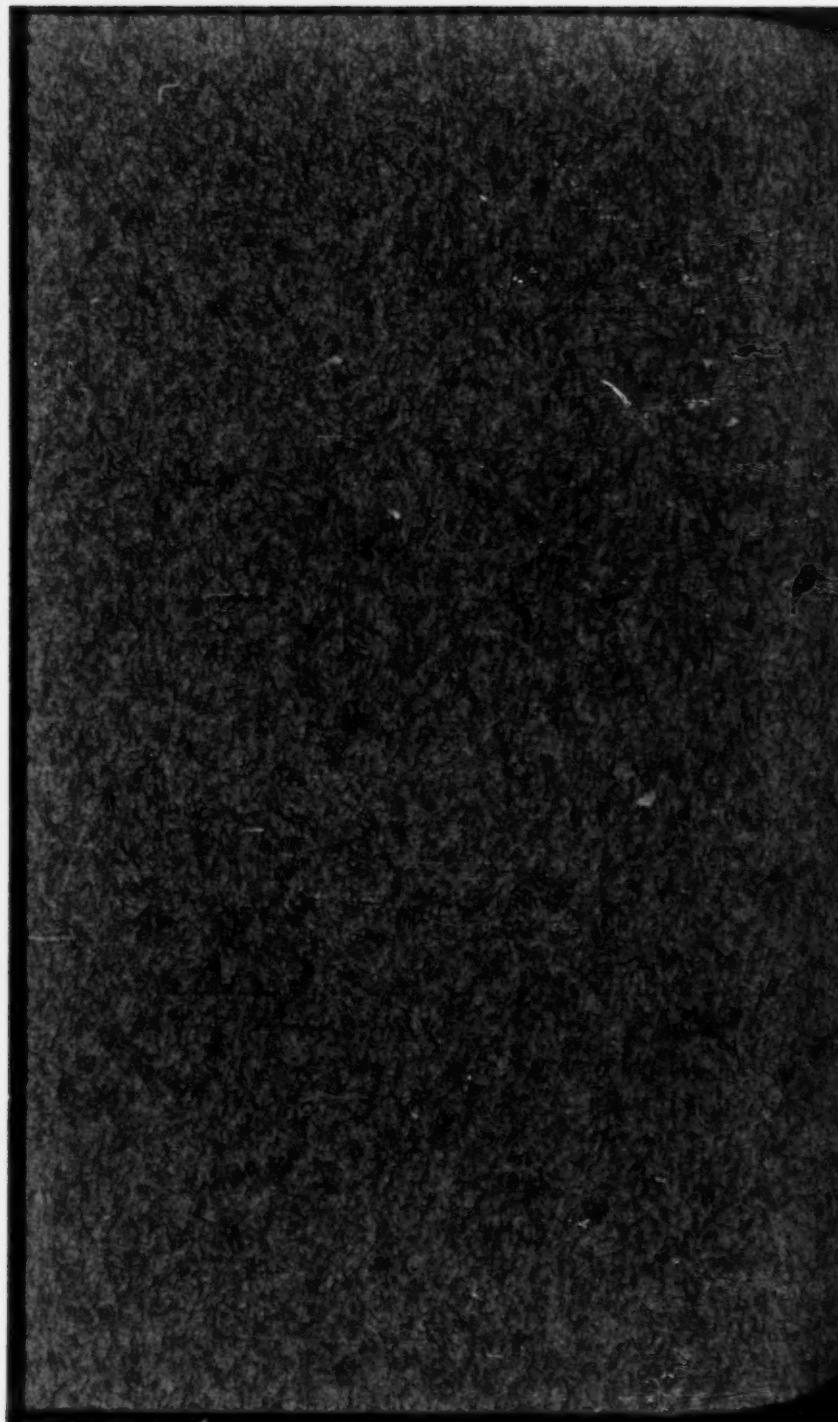
and

vs.

On Petition for a writ of Habeas Corpus

for the relief of

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INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	2
Statement.....	3
Argument.....	7
Conclusion.....	11

CITATIONS

Cases:	
<i>Abrams v. United States</i> , 250 U. S. 616.....	8
<i>Clyatt v. United States</i> , 197 U. S. 207.....	8
<i>Kassin v. United States</i> , 87 F. (2d) 183.....	8, 10
<i>Stulz v. United States</i> , 47 F. (2d) 1029.....	10
Statutes:	
Internal Revenue Code:	
Section 2803 (26 U. S. C. 2803).....	2
Section 2810 (a) (26 U. S. C. 2810 (a)).....	2
Section 2833 (a) (26 U. S. C. 2833 (a)).....	3

(i)

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 751

L. J. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority (R. 32-36) and dissenting (R. 36-37) opinions in the circuit court of appeals have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 16, 1944 (R. 37), and a petition for rehearing (R. 41-50) was denied November 14, 1944 (R. 51). The petition for a writ of certiorari was filed December 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The sole question presented is whether the evidence is sufficient to sustain petitioner's conviction.

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in part:

(a) No person shall * * * possess
* * * any distilled spirits, unless the
immediate container thereof has affixed
thereto a stamp denoting the quantity of
distilled spirits contained therein and evi-
dencing payment of all internal-revenue
taxes imposed on such spirits. * * *

* * * * *

(g) Any person who violates any pro-
vision of this section * * * shall on
conviction be punished by a fine not exceed-
ing \$1,000, or by imprisonment at hard
labor not exceeding five years, or by both.
* * *

Section 2810 (a) of the Internal Revenue Code (26 U. S. C. 2810 (a)) provides:

Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is * * *. Stills and dis-

tilling apparatus shall be registered immediately upon their being set up.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of \$500, and shall be fined not less than \$100, nor more than \$1,000, and imprisoned for not less than one month, nor more than two years.

Section 2833 (a) of the Internal Revenue Code (26 U. S. C. 2833 (a)) provides:

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than \$100 nor more than \$5,000 and imprisoned for not less than thirty days nor more than two years. * * *.

STATEMENT

Petitioner, Robert Cabe, and Sarah Ives were indicted in the District Court of the United States for the Eastern District of Oklahoma on five counts charging violations of the provisions of the Internal Revenue Code relating to (1) the possession, custody, and control of unregis-

tered stills and distilling apparatus (26 U. S. C. 2810) (R. 1-2); (2) conducting a distilling business without having given a bond as required by law (26 U. S. C. 2833) (R. 2); (3) working at a distillery upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law (26 U. S. C. 2831) (R. 3); (4) producing mash upon unregistered distillery premises (26 U. S. C. 2834) (R. 3-4); and (5) possessing distilled spirits in unstamped containers (26 U. S. C. 2803) (R. 4).

Cabe pleaded guilty to all counts (R. 5), the jury acquitted Ives (R. 5), and petitioner was convicted on counts 1, 2, and 5 (R. 5-6). Petitioner was sentenced to two years' imprisonment on each of these counts, the sentences to run concurrently, and fined \$100 each on counts 1 and 2 (R. 7, 8-9). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, the conviction was affirmed (R. 32-36, 37), with one judge dissenting (R. 36-37).

The evidence adduced by the Government at the trial in support of the indictment is, in summary, as follows:

On October 8, 1943, internal revenue agents discovered an unlicensed still half full of mash upon premises which petitioner had leased in March 1943 for a period of one year from defendant Ives' father (R. 14, 16, 17, 18). Upon these premises and about 200 yards north from the site of the still were several out-buildings

and a two-room house, which had been occupied commencing in July 1943 by defendants Ives and Cabe and the former's children (R. 14, 18). Subsequent to their indictment in this case but prior to the trial petitioner and Ives were married (R. 18). Petitioner, who was engaged "on different business," in part in hauling and trucking, was "in and out" of the premises "from July on," and between August 1 and October 8, 1943, had been "there part of the time. * * * Three or four times during those months" (R. 18).

Although no one was near the still when it was found by the agents (R. 14, 15), they found defendant Ives at the house and placed her under arrest (R. 14). When questioned at that time concerning the still, she denied any knowledge of it (R. 14, 17). Near the still the agents found a gallon jug half full of whiskey (R. 14) and several empty ten-pound sugar sacks (R. 15, 16). The whiskey "smelled like it was made out of syrup" (R. 14). Elsewhere upon the premises were found another jug partly filled with whiskey (R. 15, 16) and about 160 gallons of a "kind of white syrup" and several syrup buckets (R. 14, 17), while in a loft in the house were found about 108 gallon jugs containing nontax-paid "moonshine" whiskey (R. 14, 15, 16, 17). Outside the house was a Chevrolet automobile containing a pair of pants and shoes, and four ten-pound sacks of sugar (R. 14). The car and clothes were peti-

tioner's property, and the sugar had been transported by him to the premises (R. 15-16).

In defense, petitioner and defendant Ives offered their own testimony (R. 19-25), as well as the testimony of defendant Cabe and others (R. 19, 25-26). With reference to petitioner, the evidence was to the effect that he had leased the premises in question for the purpose of dealing in livestock, but that this venture proved unsuccessful and he had thereafter sublet the premises to defendant Cabe (R. 22, 24, 25); that petitioner then engaged in hauling lumber and feed for others (R. 22, 20, 23); that Cabe and Ives occupied the premises shortly before and at the time the still was found (R. 20, 22), but that petitioner was there only occasionally, while engaged on other business (R. 20, 21, 26); that Cabe alone had constructed the still about three weeks prior to its seizure, and had brought materials for the production of whiskey, operated the still, and handled the whiskey produced (R. 20, 21, 25-26; see also R. 22-23, 24, 25), and that petitioner did not participate in any of Cabe's activities in this respect (R. 23, 25);¹ that the sugar found in petitioner's car on October 8, 1943, was the property of Ives, who had obtained it from her sister in return for canning fruit for her and had brought it back on an occasion shortly before October 8

¹ Cabe testified as to his activities in this connection, and both he and petitioner denied the latter's participation in them.

when petitioner had driven Ives to a physician (R. 20, 23, 26); that prior to that occasion petitioner's car had not been used to haul anything to the premises (R. 20-21, 23, 24); and that sugar was not used in the manufacture of whiskey at this still (R. 26).

On cross-examination of petitioner, the Government developed the fact that he had been convicted previously of various crimes, including crimes against the internal revenue and liquor laws (R. 24-25).

After the Government had rested (R. 18-19), and again at the close of the entire case (R. 26), petitioner moved for a directed verdict. The motions were denied (R. 19, 27).

In submitting the case to the jury, the court in part charged fully as to the presumption of innocence, the burden on the Government to establish its case beyond a reasonable doubt and the meaning of reasonable doubt, the fact that the Government here relied on circumstantial evidence and that "the facts and circumstances which point to the guilt of the defendant must be consistent with each other and inconsistent with any other reasonable hypothesis than that of guilt * * *" (R. 27-30).

ARGUMENT

Petitioner asserts that there is not sufficient evidence to support his conviction and that the circumstantial evidence adduced is insubstantial and does not exclude every reasonable hypothesis

except that of guilt (Pet. 8-16).² There is no merit in these contentions.

While the evidence was entirely circumstantial, nevertheless, we submit, the trial court did not err in denying petitioner's motions for a directed verdict either at the close of the Government's case or at the close of the entire case. The evidence adduced by the Government, which we have summarized above (pp. 4-6, 7), indicated that

² While petitioner argues (Pet. 8, 9-11) that the court below, in reviewing his conviction, did not follow "the rules announced by this Court" in *Clyatt v. United States*, 197 U. S. 207, and *Abrams v. United States*, 250 U. S. 616, and that "the record was not examined for the purpose of determining whether or not at the close of the Government's case and again at the close of the whole case there was competent and substantial evidence, fairly tending to sustain the verdict" (Pet. 10), petitioner's position plainly is not predicated upon any conflict in the holding in these cases with the holding here, but resolves itself merely into an attack upon the substantiality of the evidence. And upon his own admission that the court below stated in its opinion that "the evidence is found to be legally sufficient" (Pet. 10; see R. 36), and upon examination of the opinion as a whole, it is evident that petitioner was accorded a complete review in keeping with the controlling decisions on that subject.

On a like footing is petitioner's contention (Pet. 11-14) to the effect that the opinion below is in conflict with the decisions of other circuit courts of appeals in cases cited by petitioner. Those cases deal with the general rule relating to the evaluation and weight to be accorded to circumstantial evidence. Petitioner's quarrel is, again, not with the law as enunciated by the court below (R. 35-36), which clearly conforms to the recognized rule (see, e. g., *Kassin v. United States*, 87 F. (2d) 183, 184, cited by petitioner), but with its application to the facts in this case. The same can be said of petitioner's last "proposition" (Pet. 14-16).

upon premises leased by petitioner and occupied by his fiancée, Government agents found various supplies for distillation purposes, an unlicensed still containing mash, and a sizable quantity of nontaxpaid whiskey, as well as petitioner's automobile containing his clothing and sacks of sugar. In addition, it was shown that petitioner, although not constantly present on these premises, was upon them part of the time. In these circumstances the presence of illegal distilling apparatus upon premises ostensibly under the control of petitioner furnished a clearly sufficient basis for submission of the case to the jury and warranted the denial of petitioner's motion for a directed verdict.

Although in defense the testimony of petitioner and other witnesses, if credited by the jury, would have tended to establish that petitioner was not a participant in the illegal activities to which defendant Cabe confessed, that petitioner had leased the premises to Cabe, and that his presence upon them on occasion and the presence of his personal property and the sugar in his car were all unrelated to the presence and operation of the still, the conduct of a distilling business, and the presence of nontax-paid liquor in the house, the jury, as was its province, chose to disbelieve this testimony and to accept all of the facts established by the Government as indicative of petitioner's guilt. Considering the evidence which the jury chose to credit, it cannot be said that its verdict is not predicated upon a substantial evidentiary basis.

Petitioner's assertion in effect that on the basis of applicable principles relative to conviction upon circumstantial evidence the facts in this case cannot support a verdict of guilty, is likewise without substance. The rule as to circumstantial evidence is, in effect, that where guilt depends upon such evidence, the evidence, considered *in toto*, must be inconsistent with the theory of innocence, or, as sometimes stated, exclude every reasonable hypothesis except that of guilt.² This means, we believe, no more than that a jury should not be allowed to speculate as to a defendant's guilt in a case where the circumstantial evidence, considered as a whole, does not clearly point toward guilt. The rule does not require the exclusion of every hypothesis or possibility of innocence, but only any fair and rational hypothesis except that of guilt. Nothing in the rule prevents the jury's finding guilt entirely upon circumstantial evidence; and the requirement of proof beyond a reasonable doubt operates on the whole case and not upon separate bits of evidence. Tested by these principles, the evidence here amply justifies the jury's verdict as to petitioner. The jury had before it not only the fact that petitioner had leased the premises, that he was present upon them on

² This is the rule stated in cases upon which petitioner relies. See, e. g., *Stutz v. United States*, 47 F. (2d) 1029 (C. C. A. 5), *Kassin v. United States*, 87 F. (2d) 183, 184 (C. C. A. 5).

occasion after the still had been installed, and that his car was there at the time of the seizure, but also petitioner's prior convictions for internal revenue and liquor law violations.⁴

CONCLUSION

This case does not present any question of law of general importance, nor is there any real conflict with decisions of other circuit courts of appeals or of this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1945.

⁴ It is obvious, of course, contrary to petitioner's implied contention (Pet. 12, 15), that he was not convicted upon the basis of knowledge by defendant Ives of the presence of the still and whiskey upon petitioner's premises, but was convicted upon the basis of a collocation of all the circumstances previously detailed and permissive inferences from them. Also, while there is no direct evidence that petitioner was upon the premises "while the still was in operation" (Pet. 15), the evidence does show that he was upon the premises after the still had been installed. And while Cabe testified that he did not use sugar in the manufacture of whiskey at the still, there is evidence that empty sugar sacks were found near the still. Both of these facts as shown by the record could properly be considered, as they probably were, by the jury in deciding petitioner's guilt.